A.K. CONSTRUCTION SDN. BHD

v.

UNIVERSITI KEBANGSAAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[ORIGINATING SUMMONS NO. R8-25-73-1990]
10 MAY 1991

ARBITRATION: *Application to amend points of claim - Principles on which amendments are allowed - Discretion - Error of law - Effect of - Arbitration Act 1952, s. 30(1).*

The applicant AK was a claimant in an arbitration proceeding in respect of work done under a contract. Being unhappy with the final certificate issued by the Superintending Officer (SO), AK applied to amend its points of claim.

The learned arbitrator refused to allow the proposed amendments as in his opinion the proposed amendments amounted to introducing a new cause of action and further that they related to events or matters the cause of action of which are time-barred under s. 6 of the Limitation Act 1953.

AK applied to the Court to set aside or remit the interim award of the arbitrator.

Held:

[1] The cause of action in fact remains the same, that is, the dispute concerns the final certificate dated 17 July 1985, issued by the SO. The amendments sought by the applicant are reasons which the applicant would like to plead to support its contention that the final certificate dated 17 July 1985, is invalid because of the influence and interference exerted on the SO and the QS leading to the amended statement of final account dated 16 July 1985.

[2] In refusing the application, the learned arbitrator had committed an error of law on the face of the record when he stated that the amendments would raise a new cause of action.

[AK's application allowed.]

Cases referred to:

Edward Lloyd Ltd. v. Sturgeon Falls Pulp Co. Ltd. [1900] 85 LT 162
J.L. Baker Ltd. v. Medway Building & Supplies Ltd. [1958] 1 WLR 1216
Cropper v. Smith [1884] 26 Ch D 700
Grant Advertising International Inc. & Anor. v. Glaze [1968] 1 MLJ 31
Looi Guan Kway v. Low Lean Bok [1938] MLJ 35
Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors. [1983] CLJ (Rep) 428
Kurtz v. Spence [1887] 36 Ch D 770

Legislation referred to:

Arbitration Act 1952, s. 30(1)

For the applicant - Chia Loong Thye; M/s. Skrine & Co.
For the respondent - Zainur Zakaria; M/s. Zainur Zakaria & Co.

JUDGMENT

Eusoff Chin J:

This is an application for the setting aside or remitting the interim award of the learned arbitrator made on 3 May 1990 in which the learned arbitrator had refused to allow the applicant's application to amend paras. 6 and 6.1 of his points of claim.

For ease of reference, I quote the relevant paras. 4 to 6.1 of the points of claim. The portions underlined are the proposed amendments by the applicant:

> 4. Pursuant to the said contract, the quantity surveyor, Tunku Zainol and Associate, on the instructions of the superintending officer remeasured and valued the works in accordance with the conditions of the said contract and issued a statement of final account for the works for RM8,290,833.93 on 28 September 1981.
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> 5. Despite repeated requests and demands, the Superintending Officer, in breach of the said contracts, failed, neglected and/or refused to issue to the claimants the final certificate based on the statement of final account dated 28 September 1981, within a reasonable time after the final measurement of the works. The Superintending Officer finally issued the final certificate on 17 July 1985, based on an amendment statement of final account for the works for a reduced sum of RM7,476,230.63 dated 16 July 1985, issued by the Quantity Surveyor.
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> 6. The claimants state that the final certificate issued by the Superintending Officer is invalid and not binding on the claimants and that the Superintending Officer ought to have certified the amount stated in the statement of final account dated 28 September 1981, and/or the Superintending Officer ought to have certified the actual amount payable to the claimants in accordance to the contract without being influenced by the respondent.
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> 6.1 The claimants further state that the Superintending Officer and/or his agents had been influenced by the respondents in carrying out his/their duties and the respondents, in breach of the contract, influence or attempt to influence the Superintending Officer and/or his agents in the carrying out his/their duties.

In refusing to allow the amendment the learned arbitrator stated that the proposed amendments related to matters which arose in 1980. The claimants could have sued the respondents on each of those events and matters then. He went on to state:

> 9. It is my decision that the claimant's proposed amendments to para. 6 of the points of claim amount to introducing a new cause of action of which is now time-barred under s. 6 of the Limitation Act 1953. The Limitation Act and all other written laws relating to limitation of actions apply to arbitrations as they apply to actions in Court, see: s. 30(1) of the Act.
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> 10. It is settled law that the Court does not allow amendments where the effect of doing so would be to deprive a defendant of any defence open to him under a statutory limitation.

In *Edward Lloyd Ltd. v. Sturgeon Falls Pulp Co. Ltd.* [1900] 85 LT 162, it was agreed between the parties that all points in dispute in reference to a contract for the sale and purchase of a certain property should be referred to arbitration, and the Court held that the arbitrator had the widest powers of allowing amendments in order that the parties might raise points not disclosed in the documents before him, and to allow evidence to be given before him to entitle one of the parties to claim a rescission of the contract.

In dealing with amendments generally an arbitrator should follow the principles adopted by the Courts. The main principle is that amendments should be allowed when they can be made without manifest and grave injustice:

> for the purpose of determining the real question in controversy between the parties to any proceedings

per Jenkins LJ in *J.L. Baker Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 WLR, 1216 at 1231. Generally any injustice which might otherwise be done can be cured by an order that the party asking for the amendment shall pay the costs occasioned by it. In *Cropper v. Smith* 1884, 26 Ch.D 700 at 744, Bowen LS, stated:

> There is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine.

In *Grant Advertising International Inc. & Anor. v. Glaze* [1968] 1 MLJ 31, the plaintiffs applied to amend their pleading to introduce fraud for the first time. Raja Azlan Shah J (as he then was) in allowing the amendment, adopted the principle propounded by Aitken J in *Looi Guan Kway v. Low Lean Bok* [1938] MLJ 35 which are:

1. There must be *bona fides* on the part of the applicant;
2. The amendments cause no prejudice to the other side which cannot be compensated by costs; and
3. The amendments are not such as to turn a suit of one character into a suit of another and inconsistent character.

In *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.* [1983] CLJ (Rep) 428, the Federal Court confirmed the application of these three principles when considering whether or not injustice would result if the amendments were allowed.

In *Kurtz v. Spence* [1887] 36 Ch. D 770 at 773, Cotton LJ stated:

> When by an amendment the real substantial question can be raised between the parties, ought we to refuse to allow the amendment, having regard to the rule, and to the direction in the Judicature Act that as far as possible in any proceeding all questions between the parties shall be decided so as to prevent a multiplicity of actions?

Coming back to the interim award of the learned arbitrator, he had referred to certain documents at para. 4 of his award. These documents are produced by the affidavit of Chia Loong Thye for the applicant affirmed on 30 October 1990, and they indeed show that the Superintending Officer (SO) and the Quantity Surveyor (QS) had sought the approval of the respondent: (i) on the extension of time to be granted to the claimant; (ii) on amendment and approval of variation orders. The documents also appear to show that the respondent had exerted pressure on the Quantity Surveyor to revise their final statement of accounts dated 28 September 1981, which then was for the sum of RM8,290,833.93. The documents show that because of the respondent's interference with the SO and the QS in the exercise of their functions as quasi-arbitrators, the SO had withheld the issue of the final certificate until 17 July 1985, and when issued it was on an amended statement of final account dated 16 July 1985, for a reduced sum of RM7,476,230.63.

The learned arbitrator said these matters which led to the delay of 5 years before the final certificate was issued on 17 July 1985, were matters upon which the applicant could sue the respondent separately. I think the learned arbitrator committed an error of law when he decided that the question of interference by the respondent with the functions of both the SO and QS raised a new cause of action, and since these events arose in 1981, the new cause of action is time barred. The cause of action in fact remains the same, that is, the dispute

concerns the final certificate dated 17 July 1985, issued by the SO. The amendments sought by the applicant are reasons which the applicant would like to plead to support its contention that the final certificate dated 17 July 1985, is invalid because of the influence and interference exerted on the SO and the QS leading to the amended statement of final account dated 16 July 1985. There is nothing to suggest, and the learned arbitrator did not suggest, that the amendment sought by the applicant had been made *mala fide*.

The learned arbitrator has the widest discretion to allow or to refuse an amendment. But in refusing the application, the learned arbitrator had committed an error of law on the face of the record when he stated that the amendments would raise a new cause of action.

I, therefore, allowed this application with costs. The interim award dated 3 May 1990, is set aside, and that the learned arbitrator to reconsider the application to amend the points of claim filed by the applicant.

Also found at [1991] 2 CLJ 1344